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June 12, 2006

VIA ECF AND FACSIMILE

The Honorable Jack B. Weinstein
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Stephen Caracappa, et al.
Criminal Docket No. 05-192 (JBW)

Dear Judge Weinstein:

The government writes in response to Stephen Caracappa's supplemental memorandum of June 5, 2005 and Louis Eppolito's letter of the same date. Based on these submissions and the Court's orders regarding the evidentiary hearing on the effectiveness of trial counsel, the government seeks to preclude the testimony of Edward Hayes, Esq., and Rae Koshetz, Esq., unless Caracappa provides an affidavit specifying allegations of ineffectiveness that involve claims that cannot be resolved because they pertain to matters outside of the trial record. Furthermore, the government seeks to preclude the testimony of David Giordano, Jack Ryan and Andrea Eppolito.

A. Background

The defendants Eppolito and Caracappa retained Bruce Cutler, Esq., and Mr. Hayes respectively when the allegations against them first surfaced in 1994. That representation continued when the defendants were arrested in March 2005. Up through the time of the jury's verdict, the defendants had nothing but praise for their lawyers. Indeed, during a hearing, pursuant to United States v. Curcio, 680 F.2d 881 (2d Cir. 1982), held on July 5, 2005, subsequent to the Court's warnings that because of Mr. Cutler's previous clientele, his reputation might adversely affect Eppolito at trial, Eppolito stated unequivocally that he wanted Mr. Cutler as his trial counsel. (July 5, 2005 Tr. at 10-17).

After the guilty verdict, however, the defendants changed their tune. On April 17, 2006, press reports indicated that Eppolito was unhappy with Mr. Cutler. Those reports prompted the Court to order a hearing to determine whether Mr. Cutler should be relieved because of a conflict of interest. (April 18, 2006 Order). Subsequently, each defendant obtained new counsel, and each defendant has identified a variety of reasons for ineffectiveness on the part of their trial counsel.

On May 4, 2006, the Court ordered "an evidentiary hearing to determine the facts outside the present record" to allow it to make a decision "with respect to the competency of the defense and denial of the right to testify." (May 4, 2006 Order at 1). The thrust of Eppolito's ineffectiveness accusation is that he insisted that he testify on his own behalf, but Mr. Cutler refused to allow him to do so and did not advise him that the choice was his, and not Mr. Cutler's. In light of that assertion, but to avoid hauling Messrs. Cutler and Hayes into court to face unsubstantiated accusations, on May 18, 2006, the Court ordered that at the evidentiary hearing, "the court will require any defendant raising a claim of ineffectiveness of trial counsel to testify before his former counsel will be required to testify." (May 18, 2006 Order at 2).

At the sentencing proceedings on June 5, 2006, the Court reiterated its May 18 order, stating, "I will not hear Mr. Hayes unless I hear first from Mr. Caracappa, in the same way that my order insisted that Mr. Eppolito lay a foundation for calling his former attorney." (June 5, 2006 Tr. at 48). The Court further stated that "I am not going to call a distinguished member of the federal bar or of the New York bar to answer a charge unless it has first been supported." (June 5, 2006 Tr. at 48).

B. Caracappa's Claims of Ineffectiveness, Which Are Without Merit, Can Be Decided Based on the Record and Do Not Require an Evidentiary Hearing

In his supplemental memorandum, Caracappa claims that Mr. Hayes "rendered services that were so deficient that they constituted ineffective assistance of counsel." (Mem. at 3). Caracappa accuses Mr. Hayes of failing to be prepared for trial, having no coherent trial strategy, failing to address the statute of limitations issue, and failing to investigate on behalf of Caracappa. Those claims do not justify a hearing and are without merit.

1. Caracappa Has Not Proffered Any Evidence or Claim that Necessitates a Hearing

Nowhere in his papers does Caracappa make any claim that requires a hearing. Each of Caracappa's claims is based entirely on the trial record and raises no issues that require testimony at an evidentiary hearing.[1]

In determining whether a hearing is required, courts look "primarily to the affidavit or other evidence proffered in support of the application in order to determine whether, if the evidence should be offered at a hearing, it would be admissible proof entitling the petitioner to relief." Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974) (emphasis supplied); see also United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970) (holding that a hearing is not required where the allegations are insufficient in law, "immaterial, undisputed, vague, conclusory, palpably false or patently frivolous"); United States v. Accardi, 379 F.2d 312 (2d Cir. 1967) (where the petition consisted of unsworn conclusory statement that were contradicted by the trial record, trial judge appropriately denied hearing). "Mere generalities or hearsay statements will not normally entitle the applicant to a hearing, since such hearsay would be inadmissible at the hearing itself." Dalli, 481 F.2d at 760 (internal citations omitted). Rather, "[t]he petitioner must set forth specific facts which he is in a position to establish by competent evidence." Id. at 761; accord Hayden v. United States, 814 F.2d 888, 892 (2d Cir. 1987); United States v. Aiello, 814 F.2d 109, 113 (2d Cir. 1987).

Here, Caracappa proffers no evidence, other than assertions based on the trial record and vague and conclusory generalities, that suggest he is entitled to relief. As outlined below, Caracappa's contentions are that Mr. Hayes did not (a) attend every court appearing, (b) address the statute of limitations issue, or (c) have a cohesive trial strategy. Each of these allegations is based entirely on the trial record and requires no further findings of fact at an evidentiary hearing. Similarly, Caracappa's attempt to justify a hearing by complaining that Mr. Hayes failed to properly investigate and by proffering that the investigators would testify about strategies

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[1] The only reason this Court should hold a hearing on Caracappa's claims is if Mr. Hayes and Ms. Koshetz wish to present evidence on their own behalf. See Sparman v. Edwards, 154 F.3d 51, 52 (2d Cir. 1998) (per curiam).

that Mr. Hayes failed to pursue (Mem. at 10-11) is equally unavailing.

First, the fact that Mr. Hayes employed investigators at all undermines Caracappa's claim that Mr. Hayes did not conduct a proper or thorough investigation. After all, the inquiry is not whether Caracappa's counsel conducted the most thorough investigation imaginable, but whether the investigation he did pursue was reasonable. See Strickland v. Washington, 466 U.S. 668, 690-91 (1984) ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation.").

Second, the trial record amply demonstrates that, far from ignoring the investigators, Mr. Hayes relied on the purported fruits of their labor. For example, according to Mr. Hayes's summation, the investigators uncovered evidence of monetary transactions, which Mr. Hayes used to cross-examine Burton Kaplan in an effort to undermine his credibility. (Trial T. 861-66, 3072-73). Furthermore, based on that investigation, Caracappa called James H. Harris, a former Drug Enforcement Administration special agent, to testify about money laundering in an attempt to bolster the allegations against Kaplan. (Trial T. 2846-52). Similarly, Mr. Hayes consulted an expert on excavation and digging, Anthony McLoughlin, who was ready to testify in the defense case, undoubtedly to discredit Peter Franzone by undermining his account of how he and Frank Santora, Jr., had disposed of Israel Greenwald's body. (Letter from Edward Hayes to Robert Henoch, dated Mar. 26, 2006).[2]

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[2] Gersten v. Senkowski, 426 F.3d 588 (2d Cir. 2005), upon which Caracappa relies (Mem. at 12-13), is inapposite. There, based in part on expert testimony, the defendant was convicted of sexually abusing his daughter. Id. at 591, 597-98. The trial attorney was deemed ineffective because he failed to review the evidence or investigate the experts' conclusions, which prevented him from undermining the victim's testimony. Id. at 610. Unlike the attorney in Gersten, Mr. Hayes vigorously cross-examined the government's witnesses and used information uncovered through investigation to attack their credibility. (Trial T. 244-65, 861-66, 2108-17, 2370-81, 2452-54, 2504-06). And, aside from the testimony of forensic anthropologist Bradley Adams, there was no scientific evidence in this case. Nonetheless, Mr. Hayes consulted an expert to refute Dr. Adams's testimony.

Finally, even if the investigators would testify that they told Mr. Hayes about various avenues to pursue, but Mr. Hayes chose not to pursue them, his assistance could not be deemed ineffective. "A lawyer's decision not to pursue a defense does not constitute deficient performance if, as is typically the case, the lawyer has a reasonable justification for the decision." DeLuca v. Lord, 77 F.3d 578, 588 n.3 (2d Cir. 1996); accord Greiner v. Wells, 417 F.3d 305, 319 (2d Cir. 2005). It is not for this Court to second guess such strategic decisions. See Aguirre, 912 F.2d at 563 (reversing a trial court's ineffectiveness finding because it second guessed the decisions of trial counsel). The testimony proffered by the investigators, therefore, is wholly irrelevant to whether Mr. Hayes supplied effective representation to Caracappa, which is apparent from the record.

Because Mr. Hayes used the services of the investigators to pursue a strategy at trial, the Court need not hold a hearing to learn about their internal disagreements. Such defense team discord is not relevant to the issue of whether Caracappa received effective assistance under Strickland. In essence, Caracappa's claims are based on Mr. Hayes's performance at trial, not on issues that are de hors the record. Under that circumstance, no evidentiary hearing is necessary.

2. Caracappa Cannot Demonstrate That His Counsels' Performance Fell Below Objective Standards of Reasonableness

Regardless, Caracappa has not even made a prima facie showing of ineffectiveness to warrant any further inquiry into the matter. Instead, his claim is "unacceptably based on hindsight," United States v. Jones, 918 F.2d 9, 11 (2d Cir. 1990), and impermissibly seeks to "grade counsel's performance," rather than to ascertain whether that performance caused an unreliable outcome, Strickland, 466 U.S. at 696-97. As set forth below, the Court should deny Caracappa's claim of ineffectiveness, which distorts the record and ignores his acquiescence to Mr. Hayes's performance during trial. Moreover, as explained, because each claim is based entirely on the record, the Court need not hold an evidentiary hearing.

a. Caracappa Was Represented by Both Edward Hayes and Rae Koshetz

As an initial matter, Caracappa bases his entire claim of ineffective assistance on the efforts of Mr. Hayes alone. Caracappa wholly ignores the fact that he was represented at

trial not only by Mr. Hayes, but also by Ms. Koshetz, who together provided more than adequate assistance to him. Caracappa gripes that Ms. Koshetz was given the task of cross-examining Stephen Corso and in arguing the statute of limitations issue in the summation. (Mem. at 7-8). Without the whiff of allegation that Ms. Koshetz failed to adequately represent him on those occasions, however, Caracappa cannot satisfy the first prong of the Strickland test. See United States v. Verbitskaya, 406 F.3d 1324, 1338 (11th Cir. 2005) (denying ineffective assistance claim against lead counsel because the defendant consented to lead counsel's absence, and co-counsel represented the defendant effectively); Mason v. Mitchell, 320 F.3d 604, 617 (6th Cir. 2003) (same).

While Caracappa now criticizes Mr. Hayes for being absent from Court on Friday, March 31, 2006 (Mem. at 8), on that date, he expressly consented to Mr. Hayes's absence. When the Court learned that Mr. Hayes would be absent, the following colloquy ensued:

> THE COURT: Mr. Caracappa, do you consent to your main counsel being absent at this important moment?
> CARACAPPA: Yes, I do. We spoke about it yesterday.
> THE COURT: And you have been fully informed that he wasn't going to be here?
> CARACAPPA: Yes, I was, your Honor.
> THE COURT: And you discussed all of the important decisions that have to be made this morning?
> CARACAPPA: Yes, I did your Honor.
> THE COURT: And you are satisfied to have co-counsel represent you today?
> CARACAPPA: Absolutely, your Honor.
> THE COURT: And you know that that might adversely affect your case?
> CARACAPPA: Yes, I do, your Honor.
> THE COURT: And you waive your constitutional right to have counsel of your own choosing?
> CARACAPPA: Yes, I do, your Honor.

(Trial T. 2845). Similarly, Caracappa explicitly consented to Mr. Hayes's absence from the charge conference. (Trial T. 2920). Caracappa cannot now cry foul because of Mr. Hayes's absences. Cf. Zedner v. United States, --- U.S. ---, 2006 WL 1519360, at *9 (U.S. June 5, 2006) ("[W]here a party assumes a certain position

in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. . . .” (internal quotation marks and citations omitted)). Regardless, Caracappa was adequately represented by Ms. Koshetz on those days and throughout the trial.

b. Caracappa’s Counsel Presented a Cohesive Trial Strategy

Caracappa now claims that, based on the record, Mr. Hayes had no perceptible trial strategy. (Mem. at 4-5). That claim is undermined by the record, which demonstrates that Mr. Hayes consistently and vigorously attacked the credibility of the government’s witnesses. Mr. Hayes confronted Alphonse D’Arco with testimony he had given at previous trials. (Trial T. 244-65). Mr. Hayes attacked Burton Kaplan with documents pertaining to a financial transaction in Antigua and accused him of lying to the government about it. (Trial T. 861-66). Mr. Hayes cross-examined Thomas Galpine about his previous heroin trafficking and accused him of failing to disclose it to the government. (Trial T. 2108-17) And, Mr. Hayes attacked Peter Franzone’s credibility on cross-examination and in his cross-examination of Thomas Licata and Joseph Pagnotta. (Trial T. 2370-81, 2452-54, 2504-06). Further, the bulk of his closing argument focused on why the jury should not believe the government’s witnesses. (Trial T. 3074-86).

In truth, Caracappa’s complaint is not that Mr. Hayes had no trial strategy, but that the trial strategy Mr. Hayes did have was unsuccessful. Such matters of strategy “made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” Strickland, 466 U.S. at 690; see also United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987) (“decisions which fall squarely within the ambit of trial strategy . . . if reasonably made, will not constitute a bases for an ineffective assistance claim”); Cuevas v. Henderson, 801 F.2d 586, 590 (2d Cir. 1986) (rejecting a claim based on the fact that the strategy was unsuccessful). “Judicial scrutiny of a counsel’s performance must be highly deferential” and “every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689. While a different attorney might have defended this case differently does not render Caracappa’s trial counsel ineffective. See United States v. Aguirre, 912 F.2d 555, 563 (2d Cir. 1990) (“The question is not whether some other course would have been more

successful. That can always be argued after a case has been lost. The question is whether counsel's conduct of the defense was a reasonable course at the time and came within the standards for acceptable representation."); United States v. Matalon, 445 F.2d 1215, 1219 (2d Cir. 1971) ("Whether these decisions were particularly wise or whether another trial lawyer would or would not have employed the same tactics is irrelevant."). To prevail, Caracappa must overcome the "presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy,'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)), which he cannot do in this case.

c. Statute of Limitations Was Addressed

Caracappa claims that Mr. Hayes failed to "frame the issue" of the legal elements of RICO because he failed to prepare. (Mem. at 5-6). This claim is no different than the claim that Mr. Hayes had no trial strategy, addressed above. Furthermore, Caracappa's suggestion that his attorneys ignored the crucial statute of limitations issue is belied by the fact that Ms. Koshetz coherently and forcefully argued that the statute of limitations had expired, that the drug predicates had no relationship to the predicates alleged to have occurred in the 1980s and 1990s, and that the government had cobbled together a series of crimes to overcome that problem. (Trial T. 3087-97).

3. Caracappa Was Not Prejudiced

On the prejudice prong of Strickland, Caracappa makes the conclusory assertion that "an effective presentation of all aspects of this case would likely have resulted in an acquittal on all charges against Caracappa." (Mem. at 14-15). That baseless and unexplained contention is undermined by the fact that the government presented overwhelming evidence of guilt at trial.

While Caracappa contends that the statute of limitations issue is a close one (Mem. at 14), the jury resolved it by specifically finding beyond a reasonable doubt that the conspiracy continued into the limitations period. The jury also found Caracappa guilty of two narcotics offenses, which occurred in February 2005. As explained above, Ms. Koshetz took up the arguments that Caracappa claims would have led the jury to acquit (Trial T. 3096-97), but it did not do so. Based on the record and the special findings of the jury, Caracappa cannot claim that the result would have been different if Mr. Hayes had made different strategic choices.

All told, Caracappa cannot either prong of the Strickland test; therefore, his claim for ineffective assistance of counsel should be denied.

C. The Court Should Limit the Evidence Eppolito May Present at the Evidentiary Hearing

In his June 5 letter, Eppolito explained that he is claiming ineffectiveness because "he was prohibited from participating in his own defense, testifying, and at times, even speaking with his attorney." (Ltr. at 1). In that letter, Eppolito states that in addition to himself, Mr. Cutler, and Bettina Schein, Esq., he wishes to introduce testimony from Messrs. Hayes, Giordano and Ryan, as well as Ms. Eppolito. For the reasons that follow, neither Messrs. Hayes, Giordano or Ryan, nor Ms. Eppolito, should be permitted to testify at the hearing.

As for Mr. Hayes, there is no basis for him to testify unless and until Caracappa testifies to make allegations of ineffectiveness against him, as the Court ordered on May 18. Moreover, as the government has explained, there is no basis to conclude that Caracappa received ineffective assistance, which renders any testimony by Mr. Hayes unnecessary.

Testimony from Messrs. Giordano and Ryan would provide no benefit to the Court. According to Eppolito's letter, both Messrs. Giordano and Ryan will testify about their "participation" in the case. (Ltr. at 2). The hearing was ordered to determine whether Mr. Cutler prevented Eppolito from participating in his own defense, testifying or speaking to him. (Ltr. at 1). The participation of investigators in the investigation has no bearing whatever on those issues and should be excluded.

Similarly, Ms. Eppolito has exactly nothing to contribute to the matters at issue in the hearing. Eppolito's letter indicates that Ms. Eppolito would testify "regarding her personal observations of Mr. Cutler prohibiting Mr. Eppolito from speaking with him or participating in his own defense." (Ltr. at 2). There is no indication whatsoever that Ms. Eppolito was party to any private communications between her father and Mr. Cutler. Nor is there any hint that she attended or participated in any defense strategy meetings prior to or during trial. Rather it appears that she wishes to testify to share with the Court what Your Honor was able to view Yourself, that is, how Mr. Cutler and Eppolito interacted at trial. As the Court stated:

> I observed repeatedly Mr. Eppolito conferring with counsel. Before voir dire was finished,

> counsel went back and consulted Mr. Eppolito about what he wanted to do with the jury. At the end of each cross-examination, counsel went back to see whether Mr. Eppolito wanted to have anything further to say. Mr. Eppolito constantly wrote notes and handed them to counsel, although you suggest counsel didn't read them. That was not my impression.

(May 3, 2006 Tr. at 31). Ms. Eppolito has nothing to add to the Court's own perceptions. It would be as useful for the Court to hear testimony from members of the press, who were also present and attentive during the entirety of the trial. Certainly, the Court has no interest in hearing such testimony, and it should preclude Ms. Eppolito from offering it.

D. Conclusion

The government respectfully requests that the Court deny Caracappa's ineffective assistance of counsel claim without a hearing and preclude Messrs. Hayes, Giordano and Ryan and Ms. Eppolito from testifying at the hearing regarding Eppolito's claim.

Respectfully submitted,

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cc: Defense Counsel
Clerk of the Court (JBW)